

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

T. A. SMALL,

Appellant,

VS. .

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

FRED McDONALD,
Mills Building, San Francisco,

Attorney for Appellant.

FILED

PAUL P. O'BRIEN,
CLERK

SUBJECT INDEX

	<i>Page</i>
The Information	2
The Statute	3
Abstract of the Case.....	8
The Questions Involved.....	10
Argument	10

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

T. A. SMALL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

This is an appeal from a judgment and order of the the United States District Court for the Northern District of California, Southern Division, the Honorable A. F. ST. SURE presiding, sentencing said appellant to serve a term of six months in the County jail.

THE INFORMATION

*In the Southern Division of the United States District
Court, for the Northern District of California.—
No. 28263-S.*

UNITED STATES OF AMERICA,		<i>Plaintiff,</i>
vs.		
T. A. SMALL,		<i>Defendant.</i>

INFORMATION

(Emergency Price Control Act of 1942; Title 50

U.S.C.A., Sections 902(a), 904(a), and 925(b).)

Comes now FRANK J. HENNESSY, United States Attorney for the Northern District of California, and by leave of Court first had and obtained informs this Court: That on or about the 5th day of October, 1943, at Redwood City, County of San Mateo, State of California, within the Southern Division of the Northern District of California, and within the jurisdiction of this Court, F. A. SMALL, (hereinafter called "the said defendant") did wilfully and unlawfully sell to one F. W. LARKIN certain distilled spirits, to-wit, 100 cases each of which said 100 cases contained twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, at a price of \$46.50 per case, which said price of \$46.50 per case for each of said

100 cases, each case containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, was in excess of and higher than the maximum price established by law, to-wit \$27.00 per case for each case containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, as the said defendant then and there well knew. (Maximum Price Regulation No. 445, Article VII, Section 7.8; 8 F.R. 11161.)

FRANK J. HENNESSY,
United States Attorney.

United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

ALFRED W. WORTHINGTON, being first duly sworn, deposes and says: That he is an Investigator employed by the Office of Price Administration; that he has read the foregoing Information; that he is familiar with the facts therein alleged concerning the offense therein described, and that the same are true of his own knowledge.

ALFRED W. WORTHINGTON.

Subscribed and sworn to before me this 20th day of December, 1943.

(Seal)

E. H. Norman,
Deputy Clerk, U. S. District Court,
Nor. Dist. of California.

(Endorsed): Filed Dec. 21, 1943 (2)

THE STATUTE

Title 50 U.S.C.A., section 902-A provides:

“(a) Whenever in the judgment of the Price

Administrator (provided for in section 201) (section 921 of this Appendix) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act (sections 901-946 of this Appendix), he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act (sections 901-946 of this Appendix). So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941; *Provided*, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a state-

ment of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be deemed necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, and such recommendations shall be considered by the Administrator. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act (sections 901-946 of this Appendix), he may, without regard to the foregoing provisions of this subsection, issue temporary regu-

lations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection."

Section 904 (a) of such title provides:

"It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 (section 902 of this appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202 (b) or section 205 (f) (section 922 (b) or 925 (f) of this Appendix), or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 925 (b) of such title provides:

"Any person who willfully violates any provision of section 4 of this Act (section 904 of this Appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine

of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) (section 904 of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought."

Maximum Price Regulations No. 445, Article VIII, section 7.8 provides:

"Compliance with this regulation—(a) No buying or selling above maximum prices. On and after the effective date of this regulation, regardless of any contract, agreement or other obligation, no person to whom this regulation applies shall sell or supply, and no person in the course of trade or business shall buy or receive, any distilled spirits, wine or service at prices higher than the maximum price applicable to such sale under this regulation, and no person shall agree, offer, solicit or attempt to do any of the foregoing. However, prices lower than the maximum price may be charged or paid.

"(b) Evasion. The maximum prices established under this regulation shall not be evaded by direct or indirect methods, whether by finder's fee, brokerage, commission, service, transportation or other charge or discount, premium or other privilege; by tying agreement or trade understanding; by any change in style or manner of packing; or in any other way.

"(c) Enforcement. Persons violating any provision of this regulation are subject to the criminal

penalties, civil enforcement actions and suits for treble damages provided for by the Emergency Price Control Act of 1942, and to proceedings for the suspension of licenses.”

Section 7.12 (b) of such Regulations, sub-paragraph (3) thereof, defines “Wholesaler” as follows:

“ ‘Wholesaler’ means any person (except a monopoly state or primary distributing agent) *engaged in the business* of buying and selling distilled spirits and/or wine without changing the form thereof, to persons other than consumers.”

ABSTRACT OF THE CASE

The facts of this case are briefly (the testimony of F. W. Larkin, transcript, pages 19 to 25), that F. W. Larkin, a tavern owner in Redwood City, California, being unable to secure whiskey, discussed the matter with the appellant. The appellant stated that he would see what he could do to procure some whiskey for him and later the appellant returned and said that he could get ahold of 100 cases of a whiskey known as Baltimore Club Special Reserve at a price of \$46.00 per case. Larkin then contacted two other tavern keepers, Mrs. Bertolucci and a Mrs. Baer, and agreed to take this whiskey. According to the witness Larkin, he paid \$780.00, Mrs. Bertolucci paid \$185.00, and Mrs. Baer gave a third check to make a total amount of \$1,975.00. This money was paid to the appellant. The whiskey was supposed to be at Rollandelli's Warehouse. The amount paid down represented \$19.75 a case and Larkin was supposed to pay the balance when he went to the warehouse to get the whiskey. Larkin subsequently went to this warehouse, but did not receive

any whiskey and was told there that no one knew anything about the transaction. He never at any time received any whiskey at all. Shortly thereafter the appellant came to Larkin, told him that he had heard that there was something illegal in this transaction and that he wanted nothing further to do with it, and he returned Larkin the money that he had been paid.

Mary Rollandelli, the bookkeeper and cashier of the Rollandelli Co., was called as a witness for the United States. She testified that Rollandelli and Company had purchased a number of cases of Baltimore Club Special Reserve Whiskey from the Gordon O'Neill Co., Incorporated, distillery, at \$20.40, f.o.b., that the ceiling price of this whiskey was \$26.60 or \$27.00 a case, no higher. She testified that a restraining order was served upon the Rollandelli Company sometime in November, and that no whiskey was delivered during the pendency of those proceedings. She further testified on cross-examination, that she did not know Mr. Small, the appellant here, and had never seen him until the morning of the trial; that the Rollandelli Company never had any transaction or transactions with him at any time; that the Rollandelli Company never sold any whiskey to the witness Larkin; that she had never heard of him; and that the whiskey was sold at the ceiling price under the direction of the Office of Price Administration to customers of the Rollandelli Company. None of it was sold to Larkin, and he was not a customer of the Company, and she had never heard of him.

THE QUESTIONS INVOLVED

That there is no evidence to support the verdict of "guilty" to the charges laid in the Information in this.

I.

That there is no evidence to show that the said appellant *did sell* the liquor charged in the Information to said F. W. Larkin, as charged in said Information.

II.

That the evidence is not sufficient to support the verdict of "guilty" in this, that there is no evidence to show that section 7.8, Article VII of Maximum Price Regulations No. 445 applies to this appellant for the reason that there is no evidence to show that this appellant was a wholesaler, as defined by subdivision (3) of section 7.12 (b) of the said Maximum Price Regulations.

ARGUMENT

I.

It should be noted in this case that the appellant is accused of a specific offense in the Information. The Information in this case charges that he did willfully *sell* to one F. W. Larkin certain distilled spirits, to-wit, 100 cases, each said 100 cases containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey at a price of \$46.50 per case, which said price was in excess of and higher than the maximum price established by law, to-wit, \$27.00 per case for each case containing twelve 5th-bottles of said whiskey, as the said defendant then and there well knew. The evidence did not support that charge.

There is no evidence that the witness Larkin ever received any whiskey. The evidence is that he subsequently received back the money that he paid the appellant. Evidence is that the appellant at no time had any whiskey which he could have sold the witness. The evidence is (the testimony of Mary Rollandelli, transcript pages 16 to 18), that the appellant had no transaction with the Rollandelli Company, that he was not the agent for the Rollandelli Company, and there is no evidence that there was any agreement with the Rollandelli Company for them to sell any whiskey to Larkin. The Trial Court admitted this in the Instructions to the Jury when at page 36 of the transcript it instructed the Jury:

“I instruct you that the facts adduced at the trial do not support the charge in the Information, that the defendant made an actual sale of whiskey to said Larkin because he at the time had no title to the whiskey, nor was he able to secure such title. It might be found from the evidence, however, that there was an abortive sale or contract to sell goods which the seller was unable to carry out.

“In all criminal cases the defendant may be found guilty of any offense which is necessarily included in that with which he is charged in the indictment or information, or may be found guilty of an attempt to commit the offense charged if such an attempt itself be a separate offense. Sec. 4 (a) of the Emergency Price Control Act provides: ‘That it shall be unlawful to offer, solicit, attempt or agree to sell or deliver any commodity in violation of the Maximum Price Schedule, established by the Office of Price Administration.’”

However, the verdict of the Jury (transcript, page 7)

did not find the defendant guilty of an "abortive sale or contract to sell goods," or of "an attempt to commit the offense charged," but merely found the defendant guilty, as charged in the Information. This verdict is not supported by the evidence, and therefore must be set aside. The Court further instructed the Jury (transcript, page 38):

"Now, I repeat to you, the evidence does not support a charge that there was a sale. The evidence shows that Mr. Small did not have any whiskey, nor could he get it. The whiskey here involved was restrained from sale by an Order of this Court. But, as I have said to you, if after a consideration of all the evidence of the case and applying thereto the instructions I will give you, you find that the defendant here was guilty of an attempt to sell, you may find him guilty of the charge; otherwise, you must acquit him."

The only interpretation that can be put upon this Instruction of the Court is that if the Jury found from the evidence that there was an attempt of sale they could find the appellant guilty of such an attempt. They could not under the evidence justly and legally find him guilty of a sale. For, as the Court had instructed them, there was no sale and by finding him guilty of such sale, as they clearly did by their verdict, such verdict is not supported by and is contrary to the evidence in the case and therefore should be set aside.

II.

From the testimony of the witness Larkin that he was a tavern owner and from the entire theory of the Govern-

ment's case, in order to convict the appellant of a violation of Maximum Price Regulations 445, Article VII, section 7.8, he must have been a person "to whom this Regulation applies." To determine the persons to whom such Regulation applies we must look to section 7.12 (b) which gives the definition of persons to whom this Regulation refers. Subdivision (3) of subsection (b) defines a "wholesaler" as "any person except a monopoly state or primary distributing agent engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof to persons other than consumers." The question now presents itself: Was the appellant "engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof?" The phrase "engaged in business" means more than a single act or transaction, as has been universally held by the Courts. When employed as descriptive of an occupation it conveys the idea of business being done not from time to time but all of the time. In the instant case, there was no evidence presented (except possibly the extra judicial statements of the defendant to certain officers of the Office of Price Administration (which were contradicted by the evidence of Mary Rollandelli) that the appellant ever sold one drop of whiskey. In fact, the Court in its Instructions stated that the evidence showed, "that Mr. Small did not have any whiskey, nor could he get it." (Transcript, page 38.) "He therefore had no whiskey to sell, and therefore was not in a position to deliver any." From this it is clear that he could not be and was not "a person engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof to consumers", and the evidence utterly

fails to prove that he was a "wholesaler", as the term is defined in article VII of Maximum Price Regulations 445. Therefore, if he were not a "wholesaler", as so defined in that Regulation, he was not a person to whom section 7.8 of the same Regulation applied, and, having failed to bring it within the purview of the definition of a "wholesaler" the prosecution failed to prove a material element of their case, and the verdict of the Jury, finding the defendant guilty and that he did "willfully and unlawfully sell to one F. W. Larkin certain distilled spirits" was not supported by the evidence. Summing up the evidence upon which the Jury found the appellant guilty and that he did willfully and unlawfully sell to one F. W. Larkin certain distilled spirits, to-wit, 100 cases, each of which said 100 cases contained twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, at a price of \$46.50 per case, which said price of \$46.50 per case for each of said 100 cases, each case containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, was in excess of and higher than the maximum price established by law, to-wit, \$27.00 per case for each case containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, as said defendant then and there well knew, we have:

(1) That the appellant received the sum of \$19.75 per case from the witness Larkin, being the amount of whiskey that the said witness hoped to purchase.

(2) That, although the witness Larkin testified that it was his understanding that he was to pay an additional \$27.00 per case to the Rollandelli Company, there is no evidence whatsoever, and in fact, the evidence is to the contrary (testimony of Mary Rollandelli, pages 16-18

of the transcript), that the Rollandelli Company knew nothing of any such understanding; and that there is no evidence that such sum was ever paid them. The evidence is that the Rollandelli Company had no connection with the appellant. The evidence is that the appellant was not their agent. The evidence is that when the witness Larkin went to procure the whiskey, his check was not accepted by the Rollandelli Company; that he was told that the Rollandelli Company knew nothing of the transaction; that he returned the check that he procured for the Rollandelli Company to the bank and received his money back; that the appellant subsequently returned the money that he had received; and that the witness Larkin never received any liquor.

These facts certainly cannot justify a verdict that the appellant did willfully and unlawfully sell certain distilled spirits, and that is what the Jury found by its verdict. Further, although the Court instructed the Jury "that they might find the defendant guilty of an attempt of an abortive sale", they did not do so. Reading of the verdict, together with the Information, shows that they found him guilty as charged in the Information, and not of an attempt or an abortive sale. For this reason the verdict is not supported by the evidence. In fact, it is contrary to all of the evidence in the case and should be set aside.

Further, the prosecution chose to charge the appellant with selling whiskey in violation of Maximum Price Regulations 445, Article VII, section 7.8. In order to do this it was a necessary element of the offense that they must prove that he was a person to whom that section applied. From the evidence and by the Instructions of the Court it is shown that their theory was that he was

a “wholesaler”. In order to be a “wholesaler” it was necessary to bring him within the purview of the definition of a “wholesaler”, as set forth in section 7.12 of the same Article and Regulation. This the appellant believes they have failed to do and, having failed to do so, they failed in a material element in their proof, and the appellant is entitled to a reversal of the judgment against him.

From the foregoing it is respectfully submitted that the judgment appealed from must be reversed.

Respectfully submitted,

FRED McDONALD,

Attorney for Appellant.